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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PAUL KELLOGG,

Petitioner,

-against-

WAYNE STRACK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL APPENDIX

PAUL KELLOGG
Pro Se Petitioner
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL KELLOGG, Plaintiff, -v- WAYNE STRACK, Warden, Fishkill Correctional Facility, Defendant.	96 CIV. 2118 (DLC) **MEMORANDUM OPINION AND ORDER**

DENISE COTE, District Judge:

In October 1993, Paul Kellogg ("Kellogg") was convicted following trial of second degree assault and third degree criminal possession of a weapon. Kellogg was sentenced to two 1/3 to seven years in prison on each count, to be served concurrently. The Appellate Division reviewed the merits and issued an opinion affirming the conviction on December 19, 1995. On February 12, 1996, the New York Court of Appeals denied leave to appeal. On March 22, 1996, Kellogg filed a petition for a writ of habeas corpus on the grounds that the Court had improperly admitted evidence of prior misconduct and two prior convictions. Magistrate Judge Douglas Eaton issued an Report and Recommendation on July 10, 1997 ("Report"), that recommended that the petition be denied. Petitioner's counsel filed timely objections to the Report. For the following reasons, the Report is adopted and Kellogg's petition for a writ of habeas corpus is denied.

Background

The evidence at trial established that Kellogg entered the retail store Paul Stuart in Manhattan on several occasions in late 1992, and once in the store cursed, spit and struck the walls. On December 15, 1992, Barry Goldstein, the director of security, told Kellogg that he was no longer allowed in the store and would be subject to arrest if he returned. On December 29, 1992, Kellogg appeared in the store again, speaking incoherently and cursing. Goldstein asked Kellogg to produce identification. Kellogg refused and began to walk out, but then spun around and began screaming, spitting and striking the floor with his umbrella. Security guards then led him out of the store, at which point Kellogg spat and cursed at Goldstein and swung his umbrella at Goldstein's head. The blow knocked Goldstein to the ground, his face covered with blood.

Kellogg took the stand in his own defense at trial to assert a defense of justification. He admitted swinging his umbrella at Goldstein but testified that he did so because Goldstein came at him with an angry expression and raised arms. Kellogg explained that he had not intended to strike anyone, but had acted only to keep the guards away from him and that Goldstein had walked into the path of the swinging umbrella.

The Report

Kellogg objects to the Report because, in his view, it did not adequately describe the trial testimony about the earlier incidents in December 1992 when Kellogg had

entered the store. According to the petitioner, an adequate summary would have shown that the prosecutor used the earlier incidents to demonstrate that Kellogg was mentally unstable, instead of for the purpose for which they were admitted by the court, that is, to shed light on his knowledge, motive and intent on the day of the crimes. Finally, Kellogg contends that the prosecutor intentionally elicited testimony from Kellogg about a prior conviction about which the Court had precluded examination.

The Standard

In reviewing the Report, I "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(c). Where, as here, a party has made a timely, specific written objection to portions of the Report, the district court is required to make a de novo determination regarding those parts of the Report. *Greene v. WCI Holdings Corp.*, 956 F. Supp. 509, 513 (S.D.N.Y. 1997). Kellogg's objections to the Report are timely because they were filed within ten days after his receipt of the Report. Fed. R. Civ. P. 72(b). His petition seeking a writ of habeas corpus was also timely filed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which requires a person convicted of a crime in state court to file a petition of habeas corpus within one year after the conviction becomes final. 28 U.S.C.A. § 2244(d)(1)(A).

In considering a habeas petition based on evidentiary rulings of a trial court, the writ will issue only where a state court's evidentiary ruling deprived the petitioner of

a " 'fundamentally fair trial.' " *Rosario v. Kuhlman*, 839 F.2d 918, 925 (2d Cir. 1988) (citing *Taylor v. Curry*, 708 F.2d 891 (2d Cir.), *cert. denied*, 464 U.S. 1000 (1983)). Considering de novo those portions of the trial testimony to which Kellogg directs this Court's attention through his objections, I find that there was no error, constitutional or otherwise, in allowing the jury to hear such evidence. Indeed, without the evidence about Kellogg's course of conduct in the store in the month prior to the assault, the jury would have been without critical information to place the actions of all participants in the December 29 events in context. The jury would have also been without critical evidence from which to evaluate Kellogg's motive in re-entering the store on December 29 and in behaving as he did on that day, as well as to evaluate his understanding of the employees' actions and his intent in acting as he did as he swung the umbrella.

Turning to the second objection, there is no basis to conclude that the prosecutor inquired about a conviction on November 5, 1992, in order to elicit improperly testimony about an assault conviction that the court had ruled inadmissible. Defense counsel had already elicited on direct examination of Kellogg that the defendant had been convicted of criminal mischief. On cross examination the prosecutor referred to that testimony and asked the defendant to tell the jury again what the crime was. In response, the defendant volunteered that the conviction was for assault in the third degree, a conviction that the court had ruled could not be the subject of cross examination. There is no allegation that the prosecutor inaccurately described that date of the criminal mischief conviction in his question. Moreover, the question

directed the defendant's attention explicitly to the conviction he had already identified on direct examination. In light of all of these circumstances, and for the reasons also described in the Report, there was no error in denying the motion at trial for a mistrial.

Conclusion

For the foregoing reasons, Magistrate Judge Eaton's Report is adopted and the petition for a writ of habeas corpus is denied. No certificate of appealability shall issue. Should the petitioner seek to appeal in forma pauperis, I find, pursuant to 28 U.S.C. Section 1915(a)(3), that any appeal from this Order would not be taken in good faith. *See Coppedge v. United States,* 369 U.S. 438 (1962).

SO ORDERED:

Dated: New York, New York
October 14, 1997

/s/ Denise Cote
Denise Cote
United States District Judge